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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/646,609	08/22/2003	Allen C. Buhler	BUTR-101US	9808
24314	7590	09/22/2006		
JANSSON, SHUPE, MUNGER & ANTARAMIAN, LTD 245 MAIN STREET RACINE, WI 53403				
			EXAMINER	
			PEARSE, ADEPEJU OMOLOLA	
			ART UNIT	PAPER NUMBER

1761

DATE MAILED: 09/22/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>	<b>Applicant(s)</b>	
	10/646,609	BUHLER ET AL.	
	<b>Examiner</b>	<b>Art Unit</b>	
	Adepeju Pearse	1761	

**-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 29 June 2006.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 2-4, 6-30 and 45-59 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 2-4, 6-30 and 45-59 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                     | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

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## DETAILED ACTION

### *Specification*

Objection withdrawn

### *Claim Objections*

Claim 16 objections withdrawn

### *Claim Rejections - 35 USC § 112*

Rejection withdrawn

### *Claim Rejections - 35 USC § 103*

1. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

2. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

3. Claims 2-4, 6-30 and new claims 45-59 are rejected under 35 U.S.C. 103(a) as being unpatentable over Lynch (US 5,759,609) in view of Solms-Baruth et al (U.S. Pat. No. 3,763,900), Gonsalves et al (U.S. Pat. No. 6,372,280), Kocher (U.S. Pat. No. 2, 831,775), Musser (U.S. Pat. No. 2,883,286), Viktorovna (RU 2180177), Pickenhagen et al (U.S. Pat. No. 6,025,005) and Dell et al (U.S. Pat. No. 4,251,560). The rejection and references are incorporated as cited in the prior office action.

4. With regard to claims 45, 48 and 57, Lynch discloses a low calorie butter-flavored composition comprising from 35% to about 60% water (col 1 lines 59-60, claim 1), corn syrup

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from about 15% to about 20% (col 4 lines 8-10), it is well known in the art that corn syrup is a starch hydrosylate, milk powder and proteins from 0% to 10% (col 6 lines 26-27), emulsifiers at a range from 0.05 to about 5% (col 4 lines 64-67) and flavoring at less than 1% as in claims 48 and 57 (see table 1). However, Lynch failed to disclose fat at a range from 13-16%. Gonsalves et al teach stable foams such as whipped topping having a fat content from about 5% to about 20% (col 5 lines 55-56). It would have been obvious to one of ordinary skill in the art to utilize the fat content taught by Gonsalves et al in order to provide a low-fat content product to satisfy consumer demands for low-fat food products.

5. With regard to claim 46, Lynch discloses an overrun of between 300 and 500, which encompasses applicant's range (col 2 lines 41-43).

6. With regard to claims 47 and 51, Lynch discloses suitable emulsifiers including lecithin, mono, di glycerides of fatty acids, etc (col 5 lines 3-20).

7. With regard to claim 49, Lynch discloses a low calorie butter-flavored composition comprising from 35% to about 60% water (col 1 lines 59-60, claim 1), corn syrup from about 15% to about 20% (col 4 lines 8-10), it is well known in the art that corn syrup is a starch hydrosylate, milk powder and proteins from 0% to 10% (col 6 lines 26-27), emulsifiers at a range from 0.05 to about 5% (col 4 lines 64-67) and flavoring at less than 1% (see table 1). However, Lynch failed to disclose fat at a range from 13-16%. Gonsalves et al teach stable foams such as whipped topping having a fat content from about 5% to about 20% (col 5 lines 55-56). It would have been obvious to one of ordinary skill in the art to utilize the fat content taught by Gonsalves et al in order to provide a low-fat content product to satisfy consumer demands for low-fat food

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products. In addition, it would be obvious to expect that the amounts of emulsifier and flavor would be sufficient to perform their primary functions.

8. With regard to claim 50, Lynch discloses coconut fat as a suitable fat (col 4 lines 27-30).

9. With regard to claim 52, Lynch discloses emulsifiers at a range from 0.05% to about 5% (col 4 lines 64-67).

10. With regard to claim 53, Lynch discloses the presence of corn syrup from about 15% to about 20% (col 4 lines 8-10), it is well known in the art that corn syrup is a starch hydrosylate.

11. With regard to claim 54, Lynch discloses that corn syrup with a dextrose equivalent of about 15 to about 65 is used as a sweetener but the dextrose equivalence of the corn syrup may also be varied to provide varying levels of sweetness to meet the requirements of the end use of the product. It would be obvious to one of ordinary skill in the art to expect that the DE of the hydrolyzed corn starch to be varied to about 10 in order to meet specific sweetness requirements.

12. With regard to claim 55, Lynch discloses the presence of proteins from 0 to 10% (col 6 lines 25-27).

13. With regard to claim 56, Lynch discloses that many soy protein preparations known to the art may be used because of its solubility (col 6 lines 36-43). It would be obvious to one of ordinary skill in the art to use soy powder as instantly claimed because of its solubility.

14. With regard to claim 58, Lynch failed to disclose the flavor composition. Viktorovna teaches a flavoring agent comprising of maltol, acetoin, diacetyl, gamma-nonolactone, butyric acid, caproic acid, and lactic acid at lower wt% (abstract). However, Viktorovna failed to show propylene glycol. Pickenhagen et al teach flavor substances comprising propylene glycol (see example 4) where it is utilized as a solvent. It would be obvious to one of ordinary skill in the art

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to utilize the teachings of Pickhagen et al and Viktorovna in Lynch in order to provide a flavor composition as instantly claimed. The wt% of the ingredients is seen as an experimental result variable that can be adjusted based on batch size.

15. With regard to claim 59, Lynch disclose a product having an overrun between 300 and 500 but Lynch is silent as to the stability of the topping at room temperature after dispensing from the can. However, it would be obvious to one of ordinary skill in the art to expect that the product would remain stable as recited because Lynch discloses identical ingredients within the ranges as recited by applicant and it would be expected that the products would be identical.

#### ***Response to Arguments***

16. Applicant's arguments filed 6/29/2006 have been fully considered but they are not persuasive. In response to applicant's argument that there is no suggestion to combine the references, the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, the missing elements not disclosed by the primary reference Lynch are taught by the applied secondary references. Applicant argues that Lynch is directed to a dairy free product; however, Lynch discloses the presence of milk powder as a protein source in the composition (col 6 line 26). Applicant also states that Lynch requires a high sweetener content at 30-55% wt-%, however, Lynch discloses that the sweeteners used in the invention are high

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fructose corn syrup, corn syrup with a dextrose equivalent of about 15 to about 65 (col 3 lines 64-66). In addition he discloses that the ratio of the various sweeteners can be varied to provide varying levels of sweetness to meet the requirements of the end use of the product (col 4 lines 1-4). The amount of corn syrup is from about 15% to about 20%, which encompasses applicant's recited range.

17. Applicant argues that the reference Solms-Baruth does not teach or suggest applicant's composition as claimed. However, the reference is used to show that it is well known to utilize aerosol containers for whipped compositions in order for the products to possess a long period of safe storage (abstract, col 4 lines 16-20, lines 43-45).

18. Applicant argues that the combination of Lynch and Gonsalves is improper because of the fat content disclosed by Lynch. However, Gonsalves teaches a fat content of about 5 to about 20%, which encompasses Lynch's disclosed range. Applicant can rebut a prima facie case of obviousness based on overlapping ranges by showing the criticality of the claimed range. "The law is replete with cases in which the difference between the claimed invention and the prior art is some range or other variable within the claims. In such a situation, the applicant must show that the particular range is critical, generally by showing that the claimed range achieves unexpected results relative to the prior art range." *In re Woodruff*, 919 F.2d 1575, 16 USPQ2d 1934 (Fed. Cir. 1990).

19. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). Applicant argues that Gonsalves

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is directed to a fruit-type acidic whipped topping and that Lynch includes no such emulsion and acidic component. However, these limitations are not claimed in the instant invention and besides Lynch's composition is an emulsion and mentions the presence of fruit flavors in the composition. Applicant also argues the presence of whey protein in Gonsalves and not in Lynch, again this limitation is not presently claimed, besides Lynch mentions that food proteins could be added.

### *Conclusion*

20. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Adepeju Pearse whose telephone number is 571-272-8560. The examiner can normally be reached on Monday through Friday, 8.00am - 4.30pm.




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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



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